Re Teoh Seow Chiew; Ex parte Ambank (M)

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NOTICE / PETITION NO D1–29–571 OF 2004
MOHD HISHAMUDIN J
3 DECEMBER 2008

Bankruptcy — Adjudication and receiving orders — Dispute as to sum owed — Decision by senior assistant registrar to vary amount of debt — Whether debtor had locus standi to appeal against decision pursuant to s 92 of the Bankruptcy Act — Whether debtor was legally incompetent to appeal against decision as he had not obtained the prior sanction of Director General of Insolvency as required by s 38(1)(a) of the Act — Bankruptcy Act 1967 ss 38(1)(a), 92, Schedule C rr 1, 2, 3, 4, 26, 28

Words and Phrases — 'any person aggrieved' — Meaning of — Whether it included debtors — Bankruptcy Act 1967 s 92

Subsequent to the making of a receiving order and an adjudication order against Teoh Seow Chiew ('the debtor'), Ambank (M) Bhd ('Ambank'), a creditor, filed an affidavit known as the proof of debt with the Director General of Insolvency ('DGI'). The proof of debt, which was filed pursuant to r 2 of Schedule C ('the Schedule') of the Bankruptcy Act 1967 ('the Act'), verified that the debt owing to Ambank by the debtor was in the sum of RM1,268,688.50. The DGI examined the proof, as required by r 26 of the Schedule, and admitted that the debt was for the smaller sum of RM55,151,31. Being dissatisfied with the decision of the DGI, Ambank filed an application under r 28 of the Schedule seeking an order from the Bankruptcy Court to reverse or to vary the decision of the DGI. The senior assistant registrar who heard this application allowed it and varied the amount of debt by increasing it to the amount as originally stated in the proof of debt lodged by Ambank to the DGI ie the sum of RM1,268,688.50. This was the debtor's appeal, pursuant to s 92 of the Act, against that decision. At the commencement of the hearing before the judge in chambers, Ambank raised two preliminary objections. The first preliminary objection was that the debtor had no locus standi to appeal pursuant to s 92 of the Act; and its second objection was that even if the debtor had the locus to appeal he was not legally competent as he had not obtained the prior sanction of the DGI as required by s 38(1)(a) of the Act. It was Ambank's contention that the debtor did not have locus because it was implicit in s 92 of the Act that the

words 'any person aggrieved' did not include the debtor. These preliminary objections were the issues before the judge.

Held, dismissing the preliminary objection with costs:

(1) Under s 92(2) of the Act once a person succeeds in satisfying the court that the order being appealed against is an order in a bankruptcy matter and that he is a person aggrieved by that order he has a right to appeal to the judge against the decision of the registrar. In the present case, both these requirements had been satisfied by the debtor and therefore he could not be denied the right to appeal (see para 14).

(2) The debtor was clearly an aggrieved person as the decision made by the registrar to increase the proven debt against him to a substantially larger amount would be adverse to his interest. As such Ambank's contention that 'any person aggrieved' for the purposes of s 92(2) of the Act did not include the debtor was a narrow interpretation that could not be accepted (see paras 13, 15).

(3) Based on the authorities, where a debtor/bankrupt appeals to the judge pursuant to s 92 of the Act he is not required to obtain the prior sanction of the DGI (see para 16).

[Bahasa Malaysia summary

Selepas membuat perintah penerimaan dan perintah penghakiman terhadap Teoh Seow Chiew ('penghutang'), Ambank (M) Bhd ('Ambank'), pemiutang, memfailkan satu afidavit dikenali sebagai pembuktian hutang dengan Ketua Pengarah Insolvensi ('KPI'). Pembuktian hutang, yang difailkan menurut k 2 Jadual C ('Jadual') Akta Kebankrapan 1967 ('Akta'), disahkan bahawa hutang yang terhutang kepada Ambank oleh penghutang adalah dalam jumlah RM1,268,688.50. KPI memeriksa pembuktian, seperti yang dikehendaki oleh k 26 Jadual, dan diterima bahawa hutang adalah untuk jumlah yang lebih kecil iaitu RM55,151,31. Tidak puas hati dengan keputusan KPI, Ambank memfailkan satu permohonan di bawah k 28 Jadual memohon satu perintah daripada mahkamah kebankrapan untuk mengakas atau untuk mengubah keputusan KPI. Penolong Kanan Pendaftar yang mendengar permohonan ini membenarkannya dan mengubah jumlah hutang dengan menambahkannya kepada jumlah yang pada asalnya dinyatakan di dalam pembuktian hutang yang dinyatakan oleh Ambank kepada KPI iaitu jumlah sebanyak RM1,268,688.50. Ini adalah rayuan penghutang, menurut s 92 Akta, terhadap keputusan tersebut. Pada permulaan perbicaraan di hadapan hakim dalam kamar, Ambank membangkitkan dua bantahan awalan. Bantahan awalan adalah bahawa penghutang tidak mempunyai locus standi untuk merayu menurut s 92 Akta; dan bantahan kedua adalah bahawa

walaupun penghutang mempunyai locus untuk merayu dia tidak kompeten dari segi undang-undang kerana dia tidak memperoleh persetujuan KPI seperti yang dikehendaki oleh s 38(1)(a) Akta. Ia adalah hujahan Ambank bahawa penghutang tidak mempunyai locus kerana ia jelas di dalam s 92 Akta bahawa perkataan 'any person aggrieved' tidak termasuk penghutang. Bantahan-bantahan awalan ini merupakan isu-isu di hadapan hakim.

Diputuskan, menolak bantahan awalan dengan kos:

(1) Di bawah s 92(2) Akta sebaik sahaja seseorang berjaya dalam memuaskan mahkamah bahawa perintah yang dirayu adalah perintah di dalam perkara kebankrapan dan bahawa dia adalah seorang yang terkilan dengan perintah tersebut dia mempunyai hak untuk merayu kepada hakim terhadap keputusan pendaftar. Di dalam kes ini, kedua-dua kehendak ini telah dipenuhi oleh penghutang dan oleh itu dia tidak boleh dinafikan hak untuk merayu (lihat perengan 14).

(2) Penghutang jelas seorang yang terkilan kerana keputusan yang dibuat oleh pendaftar untuk menambah hutang yang telah dibuktikan terhadapnya kepada jumlah yang lebih besar akan bertentangan dengan kepentingannya. Oleh yang demikian hujahan Ambank bahawa 'any aggrieved person' untuk tujuan s 92(2) Akta tidak termasuk penghutang adalah tafsiran yang sempit yang tidak boleh diterima (lihat perenggan 13, 15).

(3) Berdasarkan autoriti, di mana seseorang penghutang/bankrap merayu kepada hakim menurut s 92 Akta, dia tidak diperlukan untuk memperoleh persetujuan awal KPI (lihat perenggan 16).]

Notes

For a case on dispute as to sum owed, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2308.

Cases referred to

Khoo Kim Hock, Re [1974] 2 MLJ 29, HC (refd)

Lim Tai Nian, ex parte Kewangan Utama Bhd, Re [2001] 4 MLJ 78; [2002] 1 CLJ 41, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(a), 42, 92, 92(1), (2), (3), 105(1), rr 2, 26, 28, Schedule C

Hargopal Singh (Hargopal Singh & Co), PC Chew (Kwong & Allan) for the creditors.

Rohatul Akmar (Intan Rafidah with her) (Senior Federal Counsel, Attorney General's Chambers) for the Director General of Insolvency.

Mohd Hishamudin J:

[1] Enclosure 24 is an appeal to the judge in chambers by the debtor pursuant to s 92 of the Bankruptcy Act 1967 against the decision of the learned senior assistant registrar ('the registrar'). On 14 January 2008 the registrar had allowed with costs the application by the creditor in encl 19. The application vide encl 19 was made by the creditor pursuant to r 28 of Schedule *C* ('the schedule') of the Bankruptcy Act to reverse or vary the decision of the Director General of Insolvency of 24 September 2007. The decision of the Director General of Insolvency was made pursuant to r 26 of the same Schedule.

[2] Section 92 of the Bankruptcy Act states:

> 92 Appeals in bankruptcy.
>
> (1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
>
> (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.
>
> (3) For the purposes of this section the Director General of Insolvency shall be deemed to be aggrieved by the refusal of any application made by him to the court.

[3] Section 42 of the Bankruptcy Act states:

> Rules as to proof of debts.
>
> 42 The rules in Schedule C shall be observed with respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and other matters.

[4] It will be noted that s 42 speaks of the application of Schedule *C* of the Act with regard to the proving of debts by creditors before the Director General of Insolvency. In order to appreciate the rules as stipulated by Schedule *C*, in particular, as to the rights of creditors to prove their debts before the Director General of Insolvency, I shall set out rr 1–4 of the Schedule. They are as follows:

> 1. Every creditor shall prove his debt as soon as may be after the making of a receiving order.

2. A debt may be proved by delivering or sending through the post in a prepaid letter to the Director General of Insolvency an affidavit verifying the debt.

3. The affidavit may be made by the creditor himself or by some person authorised by or on behalf of the creditor or his estate. If made by a person so authorised, it shall state his authority and means of knowledge.

4. The affidavit shall contain or refer to a statement of account showing the particulars of the debt and shall specify the vouchers, if any, by which the same can be substantiated. The Director General of Insolvency may at any time call for the production of the vouchers or books of account.

[5] Rule 26 of the Schedule imposes on the Director General of Insolvency a duty to examine the proof of debt filed before him by the creditor and to make a decision as to whether to admit or to reject the proof. This rule states:

> The Director General of Insolvency shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

[6] If a creditor is dissatisfied with a decision of the Director General of Insolvency pursuant to the above r 26 in admitting or rejecting a proof, he may make an application to the Bankruptcy Court pursuant to r 28 of the Schedule seeking to reverse or to vary the decision of the Director General of Insolvency. Rule 28 of the Schedule states:

> 28 If a creditor is dissatisfied with the decision of the Director General of Insolvency in respect of a proof, the court may on the application of the creditor reverse or vary the decision.

[7] In the present case, a receiving order and an adjudication order were made against the debtor on 29 December 2005. Subsequently, Ambank (M) Bhd, a creditor, pursuant to r 2 of the Schedule, filed an affidavit verifying the debt (debt owing to the creditor by the debtor). The affidavit is known as the proof of debt and it states the debt as being in the sum of RM1,268,688.50. The Director General of Insolvency, as required by r 26 of the Schedule, examined the proof; but he admitted only a much smaller sum of RM55,151.31.

[8] Being dissatisfied with the decision of the Director General of Insolvency, the creditor, pursuant to r 28 of the Schedule, filed an application

before the Bankruptcy Court, seeking the court's order to reverse or to vary the decision of the Director General. This application was via encl 19 and was heard before the senior assistant registrar. The registrar, having heard the application, allowed it and varied the decision of the Director General in that the registrar ordered that the amount of debt admitted be increased to the sum of RM1,268,688.50, that is to say, the registrar restored the amount of debt as originally stated in the proof lodged by the creditor before the Director General of Insolvency.

[9] The debtor was dissatisfied with the decision of the registrar and he appeals to the judge in chambers pursuant to s 92 of the Bankruptcy Act.

[10] At the commencement of the hearing of this appeal, Encik Hargopal Singh, learned counsel for the creditor, raised two preliminary objections. The first preliminary objection is that the debtor has no locus to appeal pursuant to s 92. The second preliminary objection is that, even if the debtor has the locus to appeal pursuant to s 92, still, he is not legally competent to appeal as he has not obtained the prior sanction of the Director General of Insolvency as required by s 38(1)(a) of the Bankruptcy Act.

[11] Now, s 38(1)(a) provides:

> Consequences of refusal of discharge.
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

[12] Having called for and heard submissions, I have dismissed both the preliminary objections with costs. I shall now give my grounds.

[13] As to the first preliminary objection, I am mindful of the dual requirements imposed by s 92 that need to be satisfied by a potential appellant by reason of the phrases 'Orders in bankruptcy matters' and 'any person aggrieved' found in sub-s (2) of the said section. Bearing these requirements in mind, I am of the view that as to the first requirement it is plain and obvious that the order of the registrar pursuant to r 28 of the Schedule is an order in a bankruptcy matter, and as such I do not propose to discuss further on this.

[14] As to the second requirement, it is, to my mind, equally plain and obvious that the debtor is a 'person aggrieved' as the proven debt against him is now increased to a substantially much larger amount. Clearly such a decision is adverse to the interest of the debtor/bankrupt.

[15] Going by the provision of sub-s (2) of s 92, once a person succeeds in satisfying the court the following requirements, that is to say: A

(a) that the order of the registrar is an order in a bankruptcy matter (which is so in the present case); and

(b) that he is a person aggrieved by that order of the registrar (which is so in the present case), B

he has a right to appeal to the judge against the decision of the registrar pursuant to s 92. He cannot be denied this right to appeal. Whether or not he can succeed in the appeal is a different matter. C

[16] Learned counsel for the creditor argues that since r 28 allows only the creditor — and not the debtor — to apply to the Bankruptcy Court to reverse or to vary the decision of the Director General of Insolvency, it is, therefore, implicit in s 92 that the only aggrieved person, besides the Director General of Insolvency (who is deemed by sub-s (3) of s 92 to be aggrieved by the refusal of any application made by him to court), for the purpose of s 92 and in the context of the present case, is the creditor and no one else. With respect I am unable to accept this argument. In my judgment the phrase 'any person aggrieved' in sub-s (2) of s 92 cannot be given such a narrow interpretation. D E

[17] I shall now move on to the second preliminary objection of the learned counsel for the creditor. In my judgment, based on the authorities, where a debtor/bankrupt appeals to the judge pursuant to s 92, he is not required to obtain the prior sanction of the Director General of Insolvency (as required by s 38(1)(a)). In *Re Khoo Kim Hock* [1974] 2 MLJ 29 Mohd Azmi J (as he then was) dealt in depth on the issue as to the nature of the proceeding that requires the bankrupt to obtain the prior sanction of the official assignee/Director General of Insolvency. This case (that is cited) concerns an application by an undischarged bankrupt for an order annulling the adjudication order under ss 92(1) and 105(1) of the Bankruptcy Act 1967 for reasons that he ought not to have been adjudged a bankrupt as he was not indebted to anyone and that his own petition was filed under a misconception of law and liability towards his alleged creditor. I do not, however, propose to quote in full Mohd Azmi J's learned discourse on the subject. I shall be selective. I will only refer to the passages in his judgment that are relevant for the purpose of this appeal. His Lordship began the inquiry in the following manner: F G H I

> The first question for determination is whether the requirement of sanction of the official assignee under s 38(1)(a) applies only to a bankrupt's ordinary claims, ie maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt.

A Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction.

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[18] Thereafter, the learned judge made the following observations in relation to s 92:

Further, there is nothing in ss 33, 92 or 105 to indicate that it is the intention of
C the Legislature to require prior sanction of the official assignee before a bankrupt can seek relief under those provisions. Under s 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purpose he should first obtain the sanction of anyone. This is also the case where an application is made to the court
D under ss 92(1) and 105(1) of the Act.

[19] And, at a later part of the judgment, the learned judge made the following ruling:

E Accordingly, just as right of action in respect of personal damage and injury (which is excluded under s 38(1)(a) from prior sanction) is a cause of action to the benefit of which the estate is not entitled, the application in the present case is one which from its nature does not vest in the official assignee. Under the circumstances, I hold that s 38(1)(a) does not apply to an application under ss 92(1) and 105(1) of
F the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the official assignee is necessary in the present case.

[20] The judgment of Mohd Azmi J in *Re Khoo Kim Hock* was followed by
G Ian HC Chin J in *Re Lim Tai Nian, ex parte Kewangan Utama Bhd* [2001] 4 MLJ 78; [2002] 1 CLJ 41.

Preliminary objection dismissed with costs.

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Reported by K Nesan

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